Supreme Court, U. S.
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No. 74-1575

In the

Supreme Court of the United States

OCTOBER TERM, 1974

Richardson Independent School District,

Petitioner,

v.

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

HENRY D. AKIN, JR.
2655 Villa Creek
One Metro Square,
Suite 177
Dallas, Texas 75234
Counsel of Record for
Petitioner.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Richardson Independent School District, prays that a writ of certiorari issue to reverse the judgment

of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 22, 1975. By such judgment, the United States Court of Appeals reversed the District Court's Order denying Respondent's Motion for Supplementary Relief and remanded to the District Court with directions.

I.

REPORT OF THE OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, filed April 22, 1975 has been reported. U. S. v. Texas Education Agency, et al, 512 F.2d, 896, (5th Cir. 1975) (No. 74-3686, April 22, 1975). The opinion and the order are attached hereto as Appendix "A".

The District Court did not write an opinion with respect to its action on Respondent's Motion for Supplemental

Relief. The District Court's Order entered on September 19, 1974, denying such relief is attached hereto as Appendix "B".

The District Court did not write an opinion with respect to the original trial of this case. The District Court's Order entered on September 10, 1970, is attached hereto as Appendix "C".

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 25, 1975. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code, 62 Stat. 918 (1948), 28 USC Section 1254(1).

III.

QUESTIONS PRESENTED

1. On the basis of all the evidence and testimony presented -- not only at the 1974(1974 Tr. Opening and Closing State-

ments of Counsel, 47-49) hearing, but also at the 1970 trial, (1970 Tr. 136-137 and 139) the Trial Court found as fact that the racially segregated character of Hamilton Park Elementary was not the result of official action taken by the Richardson Independent School District Board. The Court of Appeals, however, found that the Board was responsible for the racially segregated character of the school. Has the Court of Appeals committed an error by overstepping its review powers to make a redetermination of the facts of this case totally contrary to the facts as found by the Trial Court, by directly violating the dictates of Rule 52 of the Federal Rules of Civil Procedure, and by undermining the final powers of judicial appraisal given to the Trial Court by this Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)?

2. As a result of the 1970 Order of the Trial Court (Appendix "C"), the Board has been operating an unitary school system by strict compliance with the dictates of that order. During the more than four (4) years the Board has operated its schools under that order, there has not been a complaint of non-compliance. In the hearing on the Respondent's Motion for Supplemental Relief in August of 1974, there also was no complaint made that the Board was not complying with that order (1974 Tr.). The Trial Court stated there was no non-compliance. (1974 Tr. Opening and Closing Statements of Counsel, 47-49) Is there a constitutional duty on the part of the Board to make an adjustment of the racial composition of the student bodies to desegregate an elementary school once a unitary school system has been ordered,

achieved, and finally found by the Trial Court to be not only in compliance with its 1970 Order, but with the law subsequent to the 1970 Order?

3. The net effect of the judgment of the Court of Appeals (Appendix "A") will be to force bussing of both minority and majority race students. In view of the history of forced bussing, is it still constitutionally sound for the courts to enter orders resulting in forced bussing?

IV.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is the Fourteenth Amendment to the Constitution of the United States, specifically the Equal Protection clause. (Appendix "D", p.21)

2. The federal rule involved is Rule 52 of the Federal Rules of Civil Procedure,

specifically Section a. (Appendix "D", p. 22).

V.

STATEMENT OF THE CASE

This desegregation action was brought by the Respondent under Title 42, Section 2000C-6 of the United States Code and under the Fourteenth Amendment of the United States Constitution. The jurisdiction of the District Court was invoked under Title 28, Section 1345, and Title 42, Section 2000C-6 of the United States Code.

This action was commenced in the United States District Court for the Northern District of Texas in August of 1970 by the Attorney General's office on behalf of the United States against the Texas Education Agency and six independent school districts including the Petitioner. The United States, Respondent, brought

suit on behalf of the parents of minor black children, alleging violations of their constitutional rights and seeking to remedy the alleged racial or ethnic segregation of certain of Petitioner's public schools.

The complaint alleged that Petitioner maintained and operated a dual school system based on race, denying Negro children the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution. This cause of action prayed for injunctive relief to restrain Petitioner from discriminating against black children by maintaining a dual system and to order Petitioner to desegregate its schools for the 1970-71 school year by appropriate means.

The entire case was tried on the merits in August of 1970, and the District Court

issued an order on September 10, 1970, (Appendix "C") requiring Petitioner to close the Hamilton Park Junior High School and to rezone the Hamilton Park Junior High attendance as part of the zones of three other junior high schools.

This same order denied the Respondent's plan recommending the pairing of the Hamilton Park Elementary School and the Stults Road Elementary school.

In addition to ordering the Petitioner to take specific affirmative action in other school activities, including a bi-racial committee, the District Court ordered Petitioner to continue to operate its elementary schools in the attendance zone system then -- and now -- in use, including Hamilton Park Elementary School, the school at issue here.

The Petitioner fully complied with this order for five (5) years, filed the required annual reports with the District Court and is presently operating its schools under this order.

In May, 1974, Respondent filed a Motion for Supplemental Relief requesting the District Court to order Petitioner to present a desegregation plan for the Hamilton Park Elementary School, which would satisfy the constitutional standards enunciated by this Court in Swann v. Charlotte-Mecklenburg Board of Education, 420 U.S. 1 (1971), and subsequent decisions of the United States Court of Appeals for the Fifth Circuit.

In August of 1974, there was a full hearing on the Respondent's Motion for Supplemental Relief. After hearing all the

evidence, testimony and argument of counsel, on September 19, 1974, the District Court entered an order denying the Respondent's Motion (see Appendix "B", pages B-7 and B-8). On October 1, 1974, Respondent filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit.

The Court of Appeals reversed said September 19, 1974, order of the District Court and remanded the case to the District Court on April 22, 1975, with directions that Petitioner present plans to the District Court to eliminate the racially segregated character of the Hamilton Park Elementary School within sixty (60) days of the issuance of its mandate on April 22, 1975, included in its opinion-order, which is reported at 512 F.2d 896. (Appendix "A").

Your Petitioner seeks review of the judgment of the United Stated Court of Appeals for the Fifth Circuit entered on April 22, 1975. A motion for stay of the mandate pending this petition for writ of certiorari to this Court was filed by Petitioner in the Court of Appeals on June 2, 1975, but the Court of Appeals denied the motion on June 12, 1975.

The Richardson Independent School District encompasses the City of Richardson, State of Texas, and parts of Dallas, Texas, including the Hamilton Park sub-division in which all the residents are black.

In 1951, the Hamilton Park sub-division was begun. The sponsor of the development was the Dallas Interracial Council, a civic group, (stipulation 16, Pl.Ex3, P. 4). On September 6, 1954, the Board

of Trustees of the school district unanimously voted to condemn land in Hamilton Park for the purpose of constructing a school. (Stipulation 22 and attachment 1 to the stipulations (Pl.Ex.3,p. 5)). The Hamilton Park School opened in 1955 to serve all grades.

In September, 1969, the school district voluntarily closed the Hamilton Park High School and reassigned the black students to other schools. The school district provided transportation to the black students to their new schools. (1970 Tr., p. 33-34)

As a result of the District Court's 1970 order, the school district closed the Hamilton Park Junior High School and added its attendance areas to three other junior high school attendance areas. (Appendix "C") Since September 19, 1970, when the District

Court refused to order Hamilton Park Elementary School and Stults Road Elementary School paired, the Hamilton Park School has continued to serve students within the Hamilton Park attendance zone. Respondent did not appeal from this order.

On appeal of the denial of the motion, the United States Court of Appeals for the Fifth Circuit reversed the District Court. It found as fact that the Richardson Independent School District was responsible for past and present discriminatory practices and for segregation of the Hamilton Park Elementary School.

VI.

REASONS FOR GRANTING OF WRIT

1. THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS FINDINGS OF FACT FOR THE FINDINGS OF FACT BY THE DISTRICT COURT.

This Court has said that a district

court in a desegregation case "will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal". Brown v. Board of Education, 347 U.S. 483,(1954); Swann v. Charlotte-Mecklenburg Board of Education, supra. This case arises under one of such "further hearings" on the question of whether the operation of a one-race school in the Richardson Independent School District meets the permissible standards of the Swann case as well as subsequent case law.

This District Court has now had two (2) full evidentiary hearings concerning the

operation of the school district. At the conclusion of the 1970 trial, the District Court stated with respect to its orders "that this accomplishes or would create a Constitutional school system with these orders". (1970 Tr. 139). At the end of the second hearing in August of 1974, (being a rehearing on exactly the same issues as the first insofar as the first involved Hamilton Park Elementary School) the District Court found, in effect, that the school district was not responsible by any of its actions for Hamilton Park Elementary School being a minority race school and that the Court's order met the Swann test. (1974 Tr. Opinion and Closing Statements of Counsel, pages 47-49).

Yet on appeal, the Court of Appeals found exactly the opposite, completely nullifying the District Court's factual

determination and substituting its own. By making such substitution, the Court of Appeals found that the School District and its Board did cause the Hamilton Park Elementary School to be a one minority race school and did not meet the Swann test.

Rule 52 provides that when a trial court makes the findings of fact, these findings shall not be changed unless they are clearly erroneous. In United States v. Yellow Cab Company, 338 U.S. 338, 70 S.Ct. 177, 94 R.Ed. 150 (1949), this Court stated that when a trial court has made its choice between two permissible views, such choice is not clearly erroneous. The District Court made such choice when it decided Richardson Independent School District was not perpetuating a dual school system. This Court has also declared that

it is not a function of a reviewing Court to decide factual issues de novo, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23L.Ed. 2d 129 (1969).

Finally, the Court of Appeals overturned the District Court, a Court that "could best perform this appraisal". This Court gave the District Court this burden, yet the Court of Appeals has negated any possibility of the District Court to make a judicial appraisal in this case and has ordered the District Court to accept forced bussing plans which it already had deemed not to be in the best interest of the students under local conditions.

2. THE COURT OF APPEALS ERRED WHEN IT ORDERED A "DESEGREGATION" OF A ONE RACE SCHOOL WHEN A UNITARY SYSTEM HAS ALREADY BEEN ORDERED AND ATTAINED.

As a result of the 1970 Order of the District Court, Petitioner has been operating a unitary school system in strict compliance with that Order. The Petitioner has complied with all segments of the 1970 Order including transportation, athletics, extra-curricular activities, affirmative faculty composition, the operation of an optional majority-to-minority transfer system, and creation and operation of an effective bi-racial committee. Finally, the Richardson Independent School District has filed annual reports with the District Court in regard to its activities since the 1970 Order. No complaint has ever been voiced nor any complaint alleged by the Respondent that Petitioner has not complied with the 1970 Order.

The 1970 Order provided that the elementary school student assignments remain as

they were. Thus, the Hamilton Park Elementary School was left to serve an all-black neighborhood whose development as a subdivision was conceded by the Respondent not to be the result of state action. (1974 Tr. Opening and Closing Statements of Counsel, p. 15).

After hearing all the evidence and testimony at the 1974 hearing, in light of Swann and all the subsequent cases, the District Court once again refused Respondent's motion to alter the one-race composition of the Hamilton Park Elementary School. In fact, the District Court stated from the bench as follows:

"Now, there is no evidence here that the school district or the Board has done anything to bring about or cause or create anymore or any discrimination whatsoever, the only evidence that I have or the only

thing I am sure of is that the Board and the school district have complied with the Order of the Court that was entered in 1970". (1974 Tr. Opening and Closing Statements of Counsel, P. 48). Further, the Petitioner underwent the scrutiny of the District Court and carried the burden of proving that the one-race composition of Hamilton Park Elementary was not the product of past or present discriminatory action on their part.

The Court of Appeals for the Fifth Circuit, however, found that Petitioner had a past history of discrimination against black students and ordered desegregation of the school. The net effect of the Court of Appeals decision is that any school district that has operated schools under a state public school segregation law can never operate a one-

minority race school and have a unitary school system.

This decision by the Court of Appeals alone makes this a case of great importance requiring that this Petition be granted because it affects literally millions of people in that the Court of Appeal's decision results in holding that there can be no one-minority-race school in any school district in any of the number of states previously having laws requiring school segregation which is clearly in conflict -- both in principle and in decision -- with this Court's holding in Swann.

3. THE COURT OF APPEALS ERRED IN ENTERING A JUDGMENT EFFECTIVELY FORCING BUSSING, SINCE SUCH A JUDGMENT IS NOW CONSTITUTIONALLY UNSOUND.

It is extremely difficult to read any newspaper which does not contain an article showing that forced bussing is not working.

Forced bussing is inherently repugnant to the will of the people of these United States; it is not working to achieve its legitimate end; and it should now be deemed unconstitutional as a means to achieve a legitimate and constitutional end.

Forced bussing was conceived as a "tool" to speed-up the process of elimination of the unconstitutional practice of school segregation. This "tool" will not do the job for which it was intended. Now the "tool" should be eliminated.

One of the principle fathers of forced bussing is Professor John S. Coleman of Johns Hopkins University. However, he

is quoted as recognizing that bussing is now counter-productive.

Professor Coleman is further quoted as stating that "The Courts have tried to take on the function of educators. And for the advocates of bussing who worked through the courts, the integration fight became a matter of realizing a principle regardless of the consequences."

Forced bussing, though ordered by the Courts many times, should now be recognized for the insidious and invidious monster it has become and be declared to be unconstitutional, and now. The granting of this Petition is the vehicle that may and should be utilized by this Court to consider this issue, vitally important to all citizens, regardless of race, and after consideration, declare forced bussing to be what it is now, unconstitutional.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HENRY D. AKIN, JR.
2655 Villa Creek
One Metro Square,
Suite 177
Dallas, Texas 75234
Counsel of Record for
Petitioner.

Appendix "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3686

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

THE TEXAS EDUCATION AGENCY, ET AL,

Defendants,

RICHARDSON INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal From The United States District Court
For The
Northern District of Texas

April 22, 1975

Before BELL, AINSWORTH, and GODBOLD,
Circuit Judges.

PER CURIAM:

The District Court denied a motion for supplemental relief filed by the United States asking that the Richardson (Texas) Independent School District be ordered to desegregate

Hamilton Park Elementary School, the only all-black school in the district. The United States appeals. We reverse.

The school district includes the City of Richardson, a suburb of Dallas; Hamilton Park, an all-black subdivision located within the City of Dallas; and part of the City of Garland, another Dallas suburb. As of April 1974 the district had 32,319 students. Only a relatively small number --1,069--were black, approximately 3%. Of the black elementary students, 71%, or 367, attend Hamilton Park Elementary.

Hamilton Park Elementary had no white students when this case was tried in August 1974. It has never had a white student. The Board of Trustees does not project that under the present zoning system it will ever have a white student. It has never had a white principal. It did not have a white teacher until 1969. Of 25 other elementary schools in the system, 24 are all white or substantially all white.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, L.Ed.2d 554 (1971), requires the courts to give close scrutiny to one-race and predominantly one-race schools located in districts with mixed population. In a system with a history of segregated schools -- and the Richardson district has such a history -- a plan of converting from dual to unitary system that permits the continued existence of one-race schools places upon the school authority the burden of showing that such assignments are genuinely nondiscriminatory. The school authorities must be able to satisfy the court that the one-race composition is not the result of present or past discrimination on their part. 402 U.S. at 26, 28 L.Ed.2d at 572. The Richardson district urges that it

passes this strict scrutiny test because while the Hamilton Park school was originally constructed in a single-race neighborhood, the character of the neighborhood is not the result of state action. The district correctly points out that, beginning around 1951, Hamilton Park was promoted by the Dallas Interracial Council as a preconceived and planned model community for black residents. In time it became the only substantial black neighborhood in the Richardson school district. The Board's argument, however, gives no recognition to other vital facts. Beginning with its initial opening in 1955, as a grade 1-12 school, the Hamilton Park school became the place of assignment for not merely the black students residing in Hamilton Park but those from all over the district. It was employed as a means to perpetuate the segregated character of a school system theretofore kept segregated by other means.[1] It continued in that role for ten years.

Negro students living more than two miles from the school were provided transportation by the school district, without regard to the proximity of white schools to their residence.

Between 1955 and 1963 Hamilton Park school was expanded by the addition of more classrooms pursuant to seven different contracts. All the classrooms were occupied by black scholastics. While more and more black students were assigned to the growing facility

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[1] Previously, all the Negro elementary students in the district attended a single all-black school (no longer in existence). All the Negro high school students were bussed to an all-black high school in Dallas.

in Hamilton Park, the district was constructing more white elementary schools [2] with white students assigned to them on a geographic basis. No whites were assigned to Hamilton Park school.

In 1965 the district adopted a desegregation plan based on a geographic system. Hamilton Park was made into a zone, and has continued to be maintained as such, with knowledge that not a single white student resided therein.

In 1969 the senior high portion of Hamilton Park school was closed and thereafter Negro high school students were bussed to other high schools in the district.

In 1970 the United States filed a suit challenging the segregated character of the Richardson system. The court approved the government's proposal that the junior high portion of Hamilton Park school be closed and the Hamilton Park zone divided into three parts for purposes of assigning black junior high students to three other junior high schools in the district. This meant that Hamilton Park school would be a facility for elementary students only. The court denied the government's proposal that Hamilton Park Elementary be paired, three grades per school with a predominantly white elementary school in the adjacent district, Stults Road Elementary, approximately three miles and 15 minutes' driving time away.

In the same order the court directed desegregation of staff and faculty, construction of buildings to promote desegregation, and creation of a biracial advisory committee.

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[2] It had only one white elementary school in 1955.

Since 1970 Hamilton Park Elementary has continued to serve students residing within the Hamilton Park zone. It has continued to be 100% black. All but one of the district's 25 other elementary schools have been virtually all white. Three other elementary schools are in adjacent zones, none more than approximately three miles from Hamilton Park Elementary. A majority to minority transfer policy in effect since 1970 has produced a handful of black transfers out of Hamilton Park, no white transfers in.

Both before and after efforts to desegregate, the burden of movement out of their immediate neighborhoods to other schools has been placed entirely upon the black citizenry. Before zoning, Negro students were transported as necessary to keep them in all-black schools. Since the 1969 closing of the high school grades at Hamilton Park school, and the 1970 order, black junior and senior high students must go out of the Hamilton Park neighborhood to schools in non-black neighborhoods.

Since 1970 the district has operated under the order then issued that permitted Hamilton Park Elementary to continue as an all-black island. The district has made no study of other alternatives. Nevertheless, an official of the district testified when this case was heard in 1974 that pairing or clustering schools would present no problems of capacity and would require some transportation but that the logistical problem could be solved.

The order of the District Court is REVERSED and the cause is REMANDED with directions that the racially segregated character of Hamilton Park Elementary be eliminated effective with the beginning of the 1975-76 school year. Within 60 days from the date of the

mandate in this case the Richardson District shall file with the District Court for its consideration proposed arrangements to achieve the result required.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 3-4101-C

UNITED STATES OF AMERICA,

Plaintiff,

versus

THE TEXAS EDUCATION AGENCY, ET AL

(Richardson Independent School District),

Defendant.

ORDER OVERRULING PLAINTIFF'S MOTION
FOR SUPPLEMENTAL RELIEF

September 19, 1974

ON the 2nd day of August, 1974, came on to be heard Plaintiff's "Motion For Supplemental Relief", and came the parties personally and by and through their attorneys of record, and the Court, after having heard the evidence, given due consideration to the entire record of the case, including all evidence given in this case and in regard to this Motion, and heard the argument of counsel, is of the opinion that said Motion should be in all things overruled;

It is, therefore, ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Supplemental

Relief is hereby overruled in its entirety.

SIGNED this 19th day of September, 1974.

/s/ W.M. Taylor, Jr.
J U D G E

Appendix "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 3-4101-C

UNITED STATES OF AMERICA,

Plaintiff,

versus

THE TEXAS EDUCATION AGENCY, ET AL

(Richardson Independent School District),

Defendant.

ORDER

September 10, 1970

This cause having come on for hearing on August 24, 1970, regarding the separate plans filed by the plaintiff and the defendant on this date for the operation of a unitary, nondiscriminatory school system in the Richardson Independent School District, and the Court having considered the testimony of the witnesses, the evidentiary exhibits, and being fully advised in the premises, it is ORDERED, ADJUDGED and DECREED:

I. Student Assignment

That part of the plaintiff's plan recommending the pairing of the Hamilton Park Elementary School and the Stults Road Elementary School is rejected. Hamilton Park Elementary School, Stults Road Elementary School, and all other elementary schools in the Richardson Independent School District shall continue to operate on the basis of the attendance zone system now in effect in the school district.

That part of the plaintiff's plan recommending the closing of the Hamilton Park Junior High School as a junior high facility is approved. The Hamilton Park Junior High School attendance area shall be zoned so that pupils in grades 7-9 living in that area will attend a Junior High School outside the Hamilton Park attendance area. In this connection, three of the Junior High School attendance zones shall be amended to include the following described areas:

RICHARDSON JUNIOR HIGH SCHOOL

North Zone — Starting at the intersection of Central Expressway and Interstate Highway #635 going southeast to the intersection of the alley south of Campanella and Schroeder Road, extending each along the alley south of Campanella extended to a point of intersection with East Boundary of Hamilton Park School zone.

FOREST MEADOW JUNIOR HIGH SCHOOL

East Zone — Starting at the intersection of Central Expressway and White Rock Creek along Central expressway to the intersection

of Forest Lane, east along Forest Lane to the intersection of Schroeder Road, north along Schroeder Road to the alley north of Oberlin Drive, then generally northeast along this alley and extended to a point of intersection with the alley west of Dandridge Drive, then north along said alley and extended to the intersection with the alley south of Campanella and east along the alley south of Campanella and extended to a point of intersection with East Boundary of Hamilton Park School zone.

NORTHWOOD JUNIOR HIGH SCHOOL

West Zone — Starting at the intersection of Central Expressway and White Rock Creek north along Central Expressway to the intersection of Forest Lane, east along Forest Lane to the intersection of Schroeder Road, north along Schroeder Road to the alley north of Oberlin Drive, then generally northeast along this alley and extended to a point of intersection with the alley west of Dandridge Drive, then north along said alley south of Campanella, then west on the alley south of Campanella to the point of intersection with Schroeder Road, then northwest along a line to the intersection of Interstate Highway #635 and Central Expressway.

II. Faculty and Other Staff

The School Board shall announce and implement the following policies:

(A) Effective not later than August 31, 1970, the principals, teachers, teacher-aides and

other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students.

The school district shall, to the extent necessary to carry out this plan, direct members of its staff as a condition of continued employment to accept new assignments.

(B) Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

(C) If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition, if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for

public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experiences within a reasonably current period. In general, and depending upon the subject matter involved, five years is such a reasonable period.

(D) In the event that the system, in connection with its implementation of this plan, plans to dismiss or demote personnel, as those terms are used in the preceding paragraphs, a report containing the following information shall be filed with the court and served upon the plaintiff:

(1) the system's non-racial objective criteria used in selecting the staff member(s) dismissed or demoted;

(2) the name, address, race, type of certificate held, degree or degrees held, total teaching experience and experience in the system and position during the 1970-71 school years of each person to be dismissed, or demoted, as defined in the preceding paragraphs; and in the case of a demotion, the person's new position

during the 1970-71 school year and his salaries for 1969-70 and 1970-71;

(3) the basis for the dismissal or demotion of each person; including the procedure employed in applying the system's non-racial, objective criteria;

(4) whether or not the person to be dismissed or demoted was offered any other staff vacancy; and if so, the outcome; and, if not, the reason.

III. Majority to Minority Transfer Policy

The school district shall permit a student attending a school in which his race is in the majority to choose to attend the nearest school where his race is in the minority. All transferring students shall be given transportation if they desire it. Transferees must be given priority for space, and the right to transfer shall not be dependent upon space being available.

The parents of each student living in the Hamilton Park Elementary School attendance area shall be notified by mail of the provisions of the majority to minority transfer policy immediately after the entry of this Order, and at least one month prior to each succeeding school year; a copy of each year's letter of notification shall be filed with the Court and served upon the plaintiff.

IV. Transportation

The transportation system of the school district shall be completely reexamined by the superintendent, his staff, and the school board. Bus routes and the assignment of students

to buses will be designed to insure the transportation of all eligible pupils on a non-segregated and other non-discriminatory basis.

V. School Construction and Site Selection

All school construction, school consolidation, and site selection (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent a dual school structure, and further shall be planned and carried out so as to achieve the objective of promoting the continuing, complete desegregation of the school system.

VI. Attendance Outside System of Residence

If the school district grants transfers to students living in this district for their attendance at public schools outside the district, or if it permits transfers into the district of students who live outside the district, it shall do so on a non-discriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district.

VII. Classroom, Non-classroom and Extra-Curricular Activities.

The school district shall be prohibited from maintaining any classroom, non-classroom, or extra-curricular activity on a segregated basis, so that no student is effectively excluded from attending any class or participating in any non-classroom or extracurricular activity on the basis of race, color or natural origin.

VIII. Protection of Persons Exercising Rights Under this Order

Within their authority, school officials are responsible for the protection of persons exercising rights under, or otherwise affected by, this Order. They shall, without delay, take appropriate action with regard to any student, teacher or staff member who interferes with the successful operation of the provisions of this Order. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

IX. Bi-Racial Advisory Committee

A Bi-Racial Committee composed of ten (10) members, five white and five black, will be appointed by the Court. One of the white and one of the black committee members shall be high school students in good standing from the district. The chairmanship of the committee shall alternate annually between a black chairman and a white chairman. The committee shall be charged generally with the responsibility for discussing ways and means of achieving interracial harmony and understanding among the students, teachers, and patrons, and shall function as an advisory body to the school board and the Court. Specifically, the committee should periodically review the transportation system, the selection of school sites, the majority to minority transfer policy, the zoning system, and all of the other requirements set out in this order to ensure their effectiveness in the operation of a unitary system in addition to such other assignments

as the Court may direct. The committee is authorized to hold hearings and make recommendations to the board in connection with these activities.

Before the school board shall submit any proposal of modification of the court-approved student assignment plan to the Court, it shall first submit such proposal to the bi-racial committee; and the bi-racial committee shall, after consideration and study of the proposed modification, submit its findings and conclusions thereon, along with any objections and/or exceptions thereto, or any recommendations or suggestions for improvement, to the school board and the Court.

X. Reporting Provision

(A) The school district shall, on November 1, 1970, and on April 15, 1971, and annually thereafter on April 15 of each succeeding year, until further order of this court, file with the clerk of this court a report setting forth the following:

(1)

(a) The number of students by race enrolled in the school district;

(b) The number of students by race enrolled in each school of district;

(c) The number of students by race enrolled in each classroom in each of the schools in the district.

(2)

(a) The number of full time teachers by race in the district;

(b) The number of full time teachers by race in each school in the district;

(c) The number of part time teachers by race in the district;

(d) The number of part time teachers by race in each school in the district.

(3)

State the number of inter-district transfers granted during the current school semester, or since the last report to the court, the race of the students who were granted such transfers, and the school district to which the transfers were allowed.

(4)

State whether the transportation system, if any, in the district is desegregated to the extent that Negro and White students are transported daily on the same buses.

(5)

State whether all facilities such as gymnasiums, auditoriums, and cafeterias are being operated on a desegregated basis.

(6)

Give brief description of any present or proposed construction or expansion of facilities; including

(a) the exact location and nature of the proposed site acquisition, new construction, or expansion;

(b) The grade levels to be served by the proposed structure, and the anticipated number and race of the students to be assigned;

(c) the action taken by the board pursuant to the submitted proposal and the anticipated dates for: (1) preliminary architectural plans, (2) final plan, (3) construction bids advertised and accepted, (4) site preparation, and (5) construction undertaken.

(7)

(a) State whether the school board has sold or abandoned any school facility, equipment, or supplies having a total value of more than $500.00 since this court's order entered this day.

(b) State whether the school board has sold, abandoned, or otherwise transferred any real property of this school district since this court's order entered this day.

(c) State whether the school board has closed or discontinued use of any school property, building or facility since this court's order entered this day.

(8)

(a) State whether there is a bi-racial advisory committee to the school board in the school district;

(b) If so, state whether the bi-racial advisory committee has submitted recommendations to the board of education;

(c) If so, state the number and disposition of such recommendations;

(d) If a bi-racial committee is in existence, state briefly the areas of the education process in which the bi-racial committee is to function.

(B) Copies of reports are to be served on plaintiff.

X.

For purposes of this plan, service on the plaintiff shall be effective by serving the Attorney General of the United States Department of Justice, Washington, D. C. 20530.

XI. Retention of Jurisdiction

Jurisdiction of this cause shall be, and the same hereby is retained for all purposes, and especially for the purpose of entering any and all further orders which may become necessary for the purpose of enforcing or modifying this order, either or both.

The clerk of this court shall be, and he hereby is directed to mail certified copies of this order by certified mail to all counsel of record and to note such mailings on the docket.

RENDERED and ENTERED this 10th day of September, 1970.

/s/ W. M. Taylor, Sr.
UNITED STATES DISTRICT JUDGE

Appendix "D"

CONSTITUTION, STATUTE AND RULE

CONSTITUTION

Section, Fourteenth Amendment to the United States Constitution.

"No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

RULE

Rule 52 of the Federal Rules of Civil Procedure: Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings

of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Supreme Court, U. S.
FILED
JUL 15 1975
MICHAEL RODAK, JR., CLERK

No. 74-1575

In the Supreme Court of the United States

OCTOBER TERM, 1975

RICHARDSON INDEPENDENT SCHOOL DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students.

The school district shall, to the extent necessary to carry out this plan, direct members of its staff as a condition of continued employment to accept new assignments.

(B) Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

(C) If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition, if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for

public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experiences within a reasonably current period. In general, and depending upon the subject matter involved, five years is such a reasonable period.

(D) In the event that the system, in connection with its implementation of this plan, plans to dismiss or demote personnel, as those terms are used in the preceding paragraphs, a report containing the following information shall be filed with the court and served upon the plaintiff:

(1) the system's non-racial objective criteria used in selecting the staff member(s) dismissed or demoted;

(2) the name, address, race, type of certificate held, degree or degrees held, total teaching experience and experience in the system and position during the 1970-71 school years of each person to be dismissed, or demoted, as defined in the preceding paragraphs; and in the case of a demotion, the person's new position

during the 1970-71 school year and his salaries for 1969-70 and 1970-71;

(3) the basis for the dismissal or demotion of each person; including the procedure employed in applying the system's non-racial, objective criteria;

(4) whether or not the person to be dismissed or demoted was offered any other staff vacancy; and if so, the outcome; and, if not, the reason.

III. Majority to Minority Transfer Policy

The school district shall permit a student attending a school in which his race is in the majority to choose to attend the nearest school where his race is in the minority. All transferring students shall be given transportation if they desire it. Transferees must be given priority for space, and the right to transfer shall not be dependent upon space being available.

The parents of each student living in the Hamilton Park Elementary School attendance area shall be notified by mail of the provisions of the majority to minority transfer policy immediately after the entry of this Order, and at least one month prior to each succeeding school year; a copy of each year's letter of notification shall be filed with the Court and served upon the plaintiff.

IV. Transportation

The transportation system of the school district shall be completely reexamined by the superintendent, his staff, and the school board. Bus routes and the assignment of students

to buses will be designed to insure the transportation of all eligible pupils on a non-segregated and other non-discriminatory basis.

V. School Construction and Site Selection

All school construction, school consolidation, and site selection (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent a dual school structure, and further shall be planned and carried out so as to achieve the objective of promoting the continuing, complete desegregation of the school system.

VI. Attendance Outside System of Residence

If the school district grants transfers to students living in this district for their attendance at public schools outside the district, or if it permits transfers into the district of students who live outside the district, it shall do so on a non-discriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district.

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The school district shall be prohibited from maintaining any classroom, non-classroom, or extra-curricular activity on a segregated basis, so that no student is effectively excluded from attending any class or participating in any non-classroom or extracurricular activity on the basis of race, color or natural origin.

VIII. Protection of Persons Exercising Rights Under this Order

Within their authority, school officials are responsible for the protection of persons exercising rights under, or otherwise affected by, this Order. They shall, without delay, take appropriate action with regard to any student, teacher or staff member who interferes with the successful operation of the provisions of this Order. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

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A Bi-Racial Committee composed of ten (10) members, five white and five black, will be appointed by the Court. One of the white and one of the black committee members shall be high school students in good standing from the district. The chairmanship of the committee shall alternate annually between a black chairman and a white chairman. The committee shall be charged generally with the responsibility for discussing ways and means of achieving interracial harmony and understanding among the students, teachers, and patrons, and shall function as an advisory body to the school board and the Court. Specifically, the committee should periodically review the transportation system, the selection of school sites, the majority to minority transfer policy, the zoning system, and all of the other requirements set out in this order to ensure their effectiveness in the operation of a unitary system in addition to such other assignments

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(1)

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(b) The number of students by race enrolled in each school of district;

(c) The number of students by race enrolled in each classroom in each of the schools in the district.

(2)

(a) The number of full time teachers by race in the district;

(b) The number of full time teachers by race in each school in the district;

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(3)

State the number of inter-district transfers granted during the current school semester, or since the last report to the court, the race of the students who were granted such transfers, and the school district to which the transfers were allowed.

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State whether the transportation system, if any, in the district is desegregated to the extent that Negro and White students are transported daily on the same buses.

(5)

State whether all facilities such as gymnasiums, auditoriums, and cafeterias are being operated on a desegregated basis.

(6)

Give brief description of any present or proposed construction or expansion of facilities; including

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(c) If so, state the number and disposition of such recommendations;

(d) If a bi-racial committee is in existence, state briefly the areas of the education process in which the bi-racial committee is to function.

(B) Copies of reports are to be served on plaintiff.

X.

For purposes of this plan, service on the plaintiff shall be effective by serving the Attorney General of the United States Department of Justice, Washington, D. C. 20530.

XI. Retention of Jurisdiction

Jurisdiction of this cause shall be, and the same hereby is retained for all purposes, and especially for the purpose of entering any and all further orders which may become necessary for the purpose of enforcing or modifying this order, either or both.

The clerk of this court shall be, and he hereby is directed to mail certified copies of this order by certified mail to all counsel of record and to note such mailings on the docket.

RENDERED and ENTERED this 10th day of September, 1970.

/s/ W. M. Taylor, Sr.
UNITED STATES DISTRICT JUDGE

Appendix "D"

CONSTITUTION, STATUTE AND RULE

CONSTITUTION

Section, Fourteenth Amendment to the United States Constitution.

"No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

RULE

Rule 52 of the Federal Rules of Civil Procedure: Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings

of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Supreme Court, U. S.
FILED
JUL 15 1975
MICHAEL RODAK, JR., CLERK

No. 74-1575

In the Supreme Court of the United States

OCTOBER TERM, 1975

RICHARDSON INDEPENDENT SCHOOL DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1575

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a school district of some 32,000 students (three percent of whom are black), seeks review of a court of appeals decision requiring it to desegregate an elementary school that was designed only for blacks when the district was racially segregated pursuant to Texas law and has had only black students in attendance in the intervening 20 years. In our view, the court of appeals correctly implemented well-established legal principles, and there is no reason for further review.

1. While this litigation began in 1970 with a lawsuit by the United States, the pending petition arises out of supplemental proceedings initiated to desegregate Hamilton Park Elementary School. Although the district court denied the motion for supplemental relief without findings or opinion (Pet. App. A7-A8), the court of appeals

found, *inter alia*, that (1) Hamilton Park was opened by petitioner in 1955 as the only school in the district for blacks regardless of residence (*id.* at A3); (2) although petitioner adopted geographic zones for elementary schools in 1965 (*id.* at A4), no whites have ever attended the school and 71 percent of all black elementary students in the district are assigned there (*id.* at A2); and (3) an official of the district testified that Hamilton Park could be desegregated by pairing or clustering it with one or more of three elementary schools, all of which were within three miles of Hamilton Park (*id.* at A5).

The court of appeals, having made this factual inquiry in accordance with this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S.1, reversed the district court's order and remanded with directions that petitioner be ordered to desegregate Hamilton Park Elementary at the beginning of the 1975-1976 school year.

2. In light of the foregoing facts, petitioner errs in suggesting (Pet. 18-21) that the district had earlier removed all vestiges of a dual school system by its 1965 conversion to geographic zones for elementary schools. The court of appeals correctly determined, on this record, that petitioner did not meet its burden of showing that the all-black composition of Hamilton Park was not the result of discrimination on the district's part, *Swann, supra*, 402 U.S. at 26. The decision in this case is consistent with analogous post-*Swann* decisions by the same court of appeals. See, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County, Florida*, 465 F.2d 878 (C.A. 5), certiorari denied, 410 U.S. 966.[1]

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[1]Petitioner's contention (Pet. 14-18) concerning the court of appeals' asserted lack of deference to the district court's findings of fact is unavailing. The district court did not make such findings concerning Hamilton Park either in the original proceedings in 1970 (see Pet. App. A9-A20) or in the 1974 supplemental proceedings (*id.* at A7-A8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General.

JULY 1975.

Supreme Court, U. S.
FILED
SEP 20 1975
MICHAEL RODAK, JR., CLERK

No. 74-1575

In the

Supreme Court of the United States

OCTOBER TERM, 1974

Richardson Independent School District,

Petitioner

v.

United States of America,

Respondent

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Clifford E. Abrams
8033 Clearsprings Road
Dallas, Texas 75240
Amicus Curiae

No. 74-1575

In the Supreme Court of the United States

OCTOBER TERM, 1974

Richardson Independent School District,

Petitioner

v.

United States of America, Respondent

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes Clifford E. Abrams and respectfully files this motion for leave to file the accompanying brief of amicus curiae.

Pursuant to Rule 42(1), the parties were requested to consent to filing the brief. Petitioner has consented. Respondent refused.

NATURE OF THE APPLICANT'S INTEREST

1. Pursuant to the mandate of the appellate court, Petitioner filed four plans ("Proposed

Arrangements") with the District Court that were designed to eliminate the racial identifiability of Hamilton Park Elementary School. Three of the plans involved pairing of Hamilton Park with the J. Frank Dobie Elementary School where my son is a student. Two undisputed facts are:

(1) the racial composition of elementary school students in the entire district is 97% white and 3% black, and

(2) the racial composition of the J. Frank Dobie Elementary school is not less than 9% black.

No evidence was submitted as to the racial composition of several other elementary schools within a distance of four or five miles.

I was therefore confronted with the possibility of having my son exposed to the danger of being bused from one integrated school to another integrated school, and appeared as amicus curiae in the District Court, the court having denied my Motion to Intervene.

The District Court adopted the fourth, a

voluntary, plan with certain conditions, retained jurisdiction, and ordered periodic reports. Therefore, the possible danger to my son still exists.

2. A review of the constitutional questions and cases cited in the accompanying brief convinced me that the removal of students from neighborhood schools and assignments to distant schools is unlawful. The accompanying brief was prepared and is submitted in the belief that every attorney should endeavor to be a true friend of the court. This is especially true in view of the disruptive effects on the educational processes that such assignments have wrought in our country, as reported daily in the newspapers.

FACTS OR QUESTIONS OF LAW THAT HAVE NOT BEEN, OR REASONS FOR BELIEVING THEY WILL NOT BE, PRESENTED BY THE PARTIES

Neither Petitioner's Petition for Writ of Certiorari or Respondent's Memorandum in Opposition treat the following:

1. The effect of such assignments on the

fundamental right to travel. It appears that this question has not been raised in any school desegregation case.

2. The question of whether or not federal courts have the authority to exercise punitive powers over the states as opposed to injunctive powers. It appears that this question has not been raised in any school desegregation case.

3. If the lower courts have misinterpreted the Supreme Court guidelines concerning transportation set forth in Swann, cited in the brief.

4. If such assignments, in effect, nullify the purposes of the cases decided under Brown, cited in the brief.

5. If the courts have ample remedies available in school desegregation cases without resort to such assignments.

RELEVANCY OF THE ABOVE MATTERS TO THE DISPOSITION OF THE CASE

In the event the United States Supreme Court affirms the decision of the appellate court, the

above matters all relate to the method of implementing the decision and would effect all school desegregation cases.

ARGUMENT AND CONCLUSION

For the foregoing reasons, it is my argument and conclusion that Petitioner's Petition for Writ of Certiorari should be granted and the matters raised herein and in the accompanying brief should be given full consideration.

Respectfully submitted,

Clifford E. Abrams
8033 Clearsprings Road
Dallas, Texas 75240

Counsel for Petitioner:
Henry D. Akin, Jr.
2655 Villa Creek
One Metro Square, Suite 777
Dallas, Texas 75234

Counsel for Respondent:
Robert H. Bork
Soliciter General
J. Stanley Pottinger
Assistant Attorney General
Department of Justice
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v.

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BRIEF OF AMICUS CURIAE

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes Clifford E. Abrams and respectfully requests the Court to consider this brief of Amicus Curiae:

I. EQUITABLE POWERS OF COURTS AND THE RIGHT TO TRAVEL

The issue presented here is whether the broad equitable powers of district courts in school desegregation cases include the power to assign students to schools that are not nearest their homes or if such assignments violate the fundamental right to travel.

The Supreme Court has made it clear that the

right to travel has long been recognized as a basic right under the Constitution, or a "fundamental right"[1].

Implicit in the right to travel is the right not to travel.

Some of the effects of assigning students to distant schools, bypassing the schools in close proximity, are:

1. endangering their persons unnecessarily by exposing them to the dangers inherent in travel on the public roads;

2. increasing the amount of time necessary for students and/or their parents to travel, thereby interfering with or depriving them of some of their freedom;

3. interfering with the educational process by

1. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumenstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941); Kent v. Dulles, 357 U.S. 116 (1958); and Oregon v. Mitchell, 400 U.S. 112 (1969).

increasing the amount of time and energy that must be devoted to the non-educational pursuit of travel; and

4. in some instances effectively nullifying a basic reason for the choice of location of residence, that of proximity to schools.

II. ORIGIN OF THE RIGHT TO TRAVEL.

Mr. Justice Harlan, in his concurring opinion in Guest, cited the case of Corfield v. Coryess, 4 Wash CC 371 (1825) in which the court stated that the right to travel was a fundamental right. The fact that Corfield was decided forty-three years before the adoption of the Fourteenth Amendment negates any proposition that the right to travel arises under and is dependent upon the Fourteenth Amendment, which strengthened the right but cannot be said to have created it. Mr. Justice Harlan also noted that the right to travel was expressly stated in the Articles of Confederation. This, then, leads to the Ninth Amendment,

which states:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people",

and to the conclusion that the right to travel, limited only by express or implied provisions of the Constitution, was retained by the people and not delegated to the United States; and to the further conclusion that the right was reserved "to the people" by the Tenth Amendment.

This right, then, cannot be denied or disparaged by a State or any subdivision thereof, or by the Federal Government or any branch therof, but only by the people by Constitutional amendment.

III. STUDENT SCHOOL ASSIGNMENTS AND THE FOURTEENTH AMENDMENT

The question presented is whether or not the assignment of students to schools not nearest their homes deprives the students and their parents of equal protection under the laws.

The Supreme Court, in Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1, 17,

interpreted the Civil Rights Act of 1964, 42 U.S.C. Section 2000c, as being

> "designed to foreclose any interpretation of the Act as expanding the existing powers of federal courts to enforce the Equal Protection Clause."

The Court went on to say that

> "The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws."

Such assignments have been made, as in Swann and other cases, by allocating students to specified schools on the basis of race. This denies equal protection under the laws by discrimination on the basis of race, since but for their race they would not be so assigned.

IV. BROWN AND SWANN DISTINGUISHED

In Brown I, 347 U.S. 483, one of the questions propounded by the Court (Footnote 13, at 495) was:

> "(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to the schools of their choice . . ."

In Brown II, 349 U.S. 294, the above question

was repeated (Footnote 1, at 298) and the Court also stated (at 300) that

> ". . .the courts may consider . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis . . .".

In Swann (at 30) the Court recited that the transportation plan previously operated by the State as a means of achieving segregation exceeded the transportation plan adopted by the District Court in both time and distance, and stated:

> "In these circumstances" (emphasis supplied), "we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation."

The District Court's plan therefore decreased the amount of danger inherent in travel on an average basis, but perhaps not on an individual basis. The best means to promote the general welfare of the students is to assign them to schools nearest their homes.

V. BROWN REVIEWED

In Brown, the Supreme Court was confronted

with the complaints of minor children who were refused admittance to their neighborhood schools on the basis of race. This was the State action prohibited by the decision in Brown. Treating "transportation" as being synonymous with "desegregation" comes full circle and arrives at the same results complained of by the minor children in Brown.

VI. PUNITIVE POWERS APPLIED TO STATES

No authority has been found, prior to school desegregation cases, for the proposition that a district court's remedial powers include or give rise to punitive powers when a State has failed to comply with the Equal Protection Clause.

The assignment of students to distant schools, thereby requiring transportation, punishes the State and its taxpayers as effectively as a monetary fine by requiring the expenditure of funds for non-educational purposes and, in itself, thereby impedes educational processes.

The greatest burden of punishment is imposed

on those who have not been shown to be at fault, the students and their parents.

VII. AVAILABLE REMEDIES

The courts have ample powers to prohibit any State action supporting segregation by:

1. requiring optional majority-to-minority transfer plans;

2. prohibiting gerrymandering of attendance zone boundaries;

3. prohibiting unfair allocations of faculty, staff, extracurricular activities and facilities;

4. prohibiting school construction and abandonment as tools to perpetuate or re-establish dual school systems;

5. enforcing the open housing laws in proper cases; and

6. enforcing the equal opportunity laws in proper cases.

It is submitted that these powers are ample, in themselves, to prohibit non-compliance with the Equal Protection Clause of the Fourteenth

Amendment without infringing on the fundamental right to travel.

WHEREFORE, it is prayed that this Court grant Petitioner's Petition for Writ of Certiorari; order that assignments of students to non-neighborhood schools is unconstitutional; or, in the alternative, clarify the ruling in Swann and restrict such assignments to similar fact situations.

Respectfully submitted,

Clifford E. Abrams
8033 Clearsprings Road
Dallas, Texas 75240

Counsel for Petitioner:
Henry D. Akin, Jr.
2555 Villa Creek
One Metro Square, Suite 777
Dallas, Texas 75234

Counsel for Respondent:
Robert H. Bork
Solicitor General
J. Stanley Pottinger
Assistant Attorney General
Department of Justice
Washington, D. C. 20530